

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

EIGHT MILE STYLE, LLC; MARTIN
AFFILIATED, LLC,

Plaintiffs,

v.

SPOTIFY USA INC., HARRY FOX
AGENCY, LLC

Defendants.

SPOTIFY USA INC.,

Third-Party Plaintiff,

v.

KOBALT MUSIC PUBLISHING
AMERICA, INC.,

Third-Party Defendant.

Civil Case No. 19-CV-00736

Hon. Aleta A. Trauger

JURY DEMAND

**PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO SPOTIFY USA INC.'S
MOTION FOR PROTECTIVE ORDER BARRING THE DEPOSITION OF DANIEL EK**

Plaintiffs respectfully proffer this brief sur-reply in further support of their Opposition to Spotify's Motion for Protective Order barring the Deposition of Daniel Ek.

Spotify's assertion that Mr. Duffett-Smith is an adequate substitute for Mr. Ek misses the mark, and their reliance on his previous deposition testimony only serves to prove that he is no substitute for Mr. Ek. Plaintiffs have already explained to the Court in their opposition the information it seeks from Mr. Ek and the pragmatic and factual reasons that Mr. Duffett-Smith cannot testify regarding the specific information they seek, and will not re-hash them here.

Indeed, Spotify's reliance on the testimony of Mr. Duffett-Smith's Deposition from the

Bluewater Case shows that Spotify's arguments are without merit. As Mr. Duffett-Smith testified, Mr. Ek, [REDACTED] (Spotify's Sealed Reply Ex. 3 at 22:24-23:1). Further undercutting Spotify's assertion that Mr. Ek's testimony should be barred because he is the CEO of a "global company that employs more than 7,100 individuals" (Doc. No. 222 at p.2), Mr. Duffett-Smith testified that at the time Spotify was planning its U.S. Launch, that [REDACTED] (Spotify's Sealed Reply Ex. 3 at 23:15-17).

Further still, Spotify alleges that Mr. Duffett-Smith "testified about mechanical licensing at Spotify's U.S. Launch" (Doc. No. 227.1 at p. 3). What Spotify fails to acknowledge that per Judge McCalla's Order, Mr. Duffett-Smith's testimony was limited to when he was acting in dual-capacity role as Head of Licensing and Business Affairs in 2015 and 2016. (*See* Sealed Opposition Ex. 1 at 34:18-37:5). Indeed, Spotify's own exhibit shows that the testimony regarding Mr. Duffett-Smith's involvement with Spotify's Launch between 2009 and July 2011 was permitted to go forward solely as [REDACTED] (Spotify's Sealed Reply Ex. 3 at 23:15-17). Further, Spotify's own selected excerpts from Mr. Duffett-Smith's deposition in *Bluewater* show that *even if* the plaintiffs there had sought to substantively probe the mechanical licensing issues between 2009 and 2011, the issue of attorney-client privilege created serious impediment serious such testimony. (*See* Spotify's Sealed Reply Ex. 3 at 29:20-34:16; 35:25-37:25). Mr. Duffett-Smith's testimony, therefore actually supports Judge McCalla's reasoning and decision ordering that the deposition of Mr. Ek proceed in *Bluewater*.

Plaintiffs are entitled to depose Mr. Ek because: Plaintiffs seek information solely in Mr. Ek's possession; Mr. Duffett-Smith's role as an attorney at the crucial time of U.S. Launch will preclude him from testifying on key issues and facts regarding liability; and Mr. Duffett-Smith's testimony in *Bluewater* only bolsters the facts that Mr. Ek was directly involved in all aspects of the company at launch. Plaintiffs' respectfully request the Court deny Spotify's motion for a protective order.

Dated: February 18, 2022

/s/ Richard S. Busch

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 18, 2022, a copy of the foregoing Sur-Reply to Spotify's Motion for Protective Order Barring the Deposition of Daniel Ek was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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